IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE ET AL.,

Petitioners.

—V.—

UNITED STATES OF AMERICA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Attorney General Opinions:

Constitution Provisions:

Statutes:

Regulations:

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC.

I.
QUESTION

Does the public have a right of access to a private waterbody, which is rendered navigable by improvements made with private funds for private purposes on private property, without compensation to the owner? Subsidary to this question is whether the navigation servitude is inseparable from federal regulatory jurisdiction under the Rivers and Harbors Act of 1899.

II.
INTEREST OF AMICUS CURIAE

Presented to this Court for review is the holding of the Ninth Circuit Court of Appeals that federal regulatory jurisdiction under the Rivers and Harbors Act (33 U.S.C. §401, et seq.) does extend to a privately owned natural waterway which is made navigable with private funds, and that a public right of use of such a waterway is inseparable from federal regulatory jurisdiction under that Act. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir. 1978), cert. granted, 78-738.

Louisiana Landowners Association, Inc. (the "Association") is a nonprofit corporation composed of 500 members who are organized for the purpose of the protection and advancement of the right of private property owners. There are numerous private waterways situated on property owned by members of the Association. Many of these waterways are artificial canals, which were constructed to provide access for mineral and timber operations, and for drainage, irrigation, reclamation, trapping and recreation activities. Certain of these waterways originally may have been non-navigable sloughs, ditches, bayous or creeks which were rendered navigable through improvements made by their owners. Such waterways have historically been treated under Louisiana law as the private property of the individual landowner on whose property they are located, subject to such landowner's exclusive regulation of its use. The members of the Association will be directly affected by a decision of this honorable Court of the issue as to whether the public has a right of use of such waterways without compensation to the owners.

Additionally, this Court's decision will affect many trappers whose income is derived from trapping operations conducted on the property of members of the Association traversed by many such waterways. Such areas, which are usually marsh and swamp lands, harbor abundant wildlife, including waterfowl, fish, reptiles, commercial furbearing animals and other quadrupeds. Trapping commercial furbearing animals is and has been a source of livelihood for many people trapping lands traversed by such waterways.[1] These people secure trapping rights from the property owners, usually in the form of a trapping lease, which customarily is granted for a nominal consideration.

The real benefit to the landowner is not the small amount of money paid by the trapping lessee; it is the trapper's possession of the landowner's property which prevents loss of title through adverse possession of others. Adverse possession is often a real problem because of the remoteness and inaccessibility of the property, with very few natural monuments that indicate property lines. A trapper, however, knows his leasehold and its boundaries; and he protects his leasehold from trespassing poachers because they threaten the livelihood of himself and his family. Moreover, trappers also serve a useful conservation function by protecting the environment and by preserving other forms of wildlife from indiscriminate depletion.

If this honorable Court were to hold that waterways located on private property and made navigable with private funds for private purposes are subject to public access and use, the effect on the trapping industry could be devastating, as it would be virtually impossible to prevent indiscriminate trespassing and poaching, with their concomitant deleterious effect on the marsh and swamp

[1] In 1978, over 12,000 trapping licenses were issued by the State of Louisiana. In 1977-78, trappers took over 3,690,000 pounds of commercial furbearing animal meat and 3,700,000 pelts, with a combined value of $13,300,000 (which was down from $24,700,000 in 1976-77). Statistics from Louisiana's Department of Wildlife and Fisheries.

ecosystems. Since many members of the Association have granted trapping leases affecting their property, the decision of this honorable Court in this cause is of great interest to the Association for that additional reason.

III.
ARGUMENT

A. The Exercise of Powers Derived From the Commerce Clause is Limited by the 5th Amendment

The Circuit Court held that Kaiser Aetna's marina is subject to regulatory jurisdiction under the Rivers and Harbors Act of 1899 (33 U.S.C. §401, et seq., herein the "RHA"), and, as a result thereof, the so-called navigation servitude automatically attaches thereto affording a public right of access without compensation to the owners.

The Commerce Clause (art. 1, §8, cl. 3) of the Constitution grants to the United States the power to *regulate* commerce between the states upon "all navigable waters of the United States" to assure that the same remain free and unobstructed public highways. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25, 18 L.Ed. 96, 99 (1866). Congress has delegated the duty to protect and preserve navigable waters of the United States as public highways to the Department of the Army, United States Corps of Engineers under the RHA. Nevertheless, that power, regardless of how it is exercised, is limited by the 5th Amendment to the Constitution which guarantees that no person shall be deprived of property without due process of law and just compensation. "Confiscation may result from a taking of the use of property without compensation quite as well as from taking of the title." *Chicago R. I. & P. R. Co. v. United States*, 284 U.S. 80, 96, 76 L.Ed. 177, 186 (1931); cf. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 53 L.Ed. 1024 (1909).

While public access to and use of navigable waters of the United States is derived from regulatory powers conferred by the Commerce Clause, in exercising that power, Congress must assure that private property rights protected by the 5th Amendment are not abridged:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the 5th Amendment of the Constitution; and of course in its exercise of the power to regulate commerce Congress may not override the provision that just compensation must be made when private property is taken for public use.
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> * * *
>
> "All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all." *Scranton v. Wheeler*, 179 U.S. 141, 153-154, 162, 45 L.Ed. 126, 133-134; 137 (1900). See also *Monongahela Navigation Company v. United States, 148 U.S. 312, 37 L.Ed. 463 (1893)*

The District Court considered the issue of whether a public right of access to Kaiser Aetna's marina was afforded under the navigation servitude to be separable from the issue of whether the marina was subject to regulation under the RHA. The Circuit Court however considered these issues to be inseparable in holding the servitude ap-

plied to any waterbody subject to RHA jurisdiction. A brief examination of the origin and application of the navigation servitude doctrine will point up the Circuit Court's misapprehension in treating these issues as inseparable because of the Constitutional constraints placed upon exercising the navigation servitude where private property rights are affected as a result thereof.

B. The Navigation Servitude Is Limited by the 5th Amendment

The power to regulate commerce under the Commerce Clause confers upon the United States a "dominant servitude" over the bed and flow of "navigable waters of the United States" to aid navigation thereon and thereover. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967); cf. *United States v. Doughton*, 62 F.2d 936 (4th Cir. 1933). When the navigation servitude is lawfully exercised by the United States, no compensation for damage to, or deprivation of, private property rights is required because they are subordinate to the United States' power to protect and preserve navigable waters of the United States as public highways of interstate commerce. *United States v. Kansas City Life Insurance Co.*, 399 U.S. 799; *United States v. Chicago M. St. P. & P. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913).

Because the application of the servitude may result in a deprivation of private property rights, this honorable Court early on mandated that it should never be exercised in a Constitutional vacuum; the limitations imposed by the 5th Amendment on any exercise of power derived from the Commerce Clause must always be observed:

> "The general rule that private ownership of property in the beds and waters of navigable streams is subject to the exercise of the public right of navigation, and the governmental control and regulation necessary to give affect to that right, is so fully established, and is so amply illustrated by recent decisions of this court that a mere reference to the cases will suffice***(Citations omitted).
>
> "(T)his rule, like every other, has its limits, and in the present case, which require us to ascertain the dividing line between public and private right, it is important to inquire what are 'navigable streams' within the meaning of the rule"... *United States v. Cress*, 243 U.S. 316, 320-321, 61 L.Ed. 746, 750 (1917).[2]

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 37 L.Ed. 463 (1893); *United States v. Rands*, 389 U.S. 121. In *Monongahela Navigation Company*, this Court stated:

> "Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." 148 U.S. at 336, 37 L.Ed. at 471.

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[2] This Court later limited its holding in the *Cress* case to the facts there disclosed in the decision of *United States v. Chicago, M. St. P. & P. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064 (1941). That limitation, however, was not directed to the 5th Amendment constraints on the exercise of the navigation servitude.

C. The 5th Amendment Precludes Application of the Navigation Servitude to Private Waterbodies Rendered Navigable With Private Funds For Private Purposes

The Daniel Ball established the test of navigability of rivers and streams which constituted "navigable waters of the United States" for purposes of admiralty jurisdiction and regulatory jurisdiction under various acts of Congress as those waterways which are, in their ordinary condition, navigable in fact and form part of a continuous navigable highway of commerce between the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999, 1001 (1870).

The Daniel Ball's test of navigability was modified in *The Montello*, 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874), holding a once navigable in fact river did not lose its navigable character by reason of artificial obstructions; in *Economy Light and Power Company v. United States*, 265 U.S. 113, 65 L.Ed. 847 (1921), holding that a water body remains navigable for regulatory purposes even though it subsequently may become non-navigable because of a change in conditions or the presence of artificial constructions; and in *United States v. Apalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940) holding an entire waterway navigable where non-navigable portions could be made available for commercial interstate navigation with "reasonable improvements". *Appalachian* was the most significant modification of *The Daniel Ball* test of navigability, but nothing in that decision suggests that the natural waterbodies which can be made navigable by reasonable improvements contemplated by this honorable Court included not only those made navigable for public purposes with public funds, but also privately owned waterbodies made navigable with private funds for private purposes.

All of these cases concerned rivers and streams totally or

at least partially navigable in their natural conditions, not private waterbodies either cut through private property or non-navigable existing waterbodies made navigable by artificial means at great private expense. It can hardly be argued that turning a shallow non-navigable and privately owned fish pond into a private marina through extensive construction and financial investment by the owners is a "reasonable improvement" of an existing natural waterway contemplated by this honorable Court in announcing its decision in *Apalachian*.

In *United States v. Cress*, 243 U.S. 316, 61 L.Ed. 746 (1917), this Court followed *The Daniel Ball* concept of navigability in speaking of those water bodies to which the navigation servitude attached, but recognized the distinction that such rivers and streams must also be navigable in their *natural* condition:

> "That the test of navigability in fact should be applied to streams in their natural condition was in effect held in The Daniel Ball, 10 Wall. 577, 19 L.Ed. 999...
>
> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interest of navigation is a natural servitude, confined to such streams as, in their ordinary and natural conditions, are navigable in fact and confined to the natural condition of the stream." *United States v. Cress*, 243 U.S. at 323-326, 61 L.Ed. at 751-752.

The *Cress* requirement of natural navigability has been adhered to in subsequent cases involving judicial recognition of the application of the navigation servitude where

private property rights were taken or used as a consequence of its application. Representative of such recognition are: *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680 (6th Cir. 1898); *Harrison v. Fite,* 148 F. 781 (8th Cir. 1906); *Goose Creek Hunting Club, Inc. v. United States,* 518 F.2d 579 (Ct. Cl. 1975); *Iowa-Wisconsin Bridge Co. v. United States,* 84 F. Supp. 852 (Ct. Cl. 1949); cf. *Utah v. United States,* 403 U.S. 9, 29 L.Ed.2d 279 (1971); *Minnehaha Cr. Watershed Dist. v. Hoffman,* 449 F. Supp. 876 (D. Minn. 1978); and *Leovy v. United States,* 177 U.S. 621, 44 L.Ed. 914 (1900). In *Harrison v. Fite,* the Court stated:

> "To meet the test of navigability as understood in the American law a water course should be . . .of practical usefulness to the public as a public highway in *its natural state and without the aid of artificial means.*" 148 F. at p. 783. (Emphasis added)

Although this Court did not amplify upon its limitation of the servitude to rivers and streams in their *natural* condition in *Cress,* or in any of its subsequent decisions adhering to the requirement, the *ratio decidendi* of the limitation seems apparent. One who takes title to the bed and/or banks of a river or stream which is navigable under *The Daniel Ball* test of navigability in *its natural condition* acquires that title subject to all advantages and disadvantages of riparian ownership, including impressment of the navigation servitude as an inchoate lien or charge on the bed, banks and surface water. Thus, the reason the Fifth Amendment requires no compensation when riparian property rights in and to the bed and bank of a river or stream navigable in its natural condition are taken is because the riparian owner's title there is imperfect; this removes the Fifth Amendment constraints from any taking of such riparian rights pursuant to an exercise of the navigation servitude. *United States v. Kansas City Life Insurance Co.,*

339 U.S. 799, 94 L.Ed. 1277 (1950). *Silver Springs Paradise Co. v. Ray,* 50 F.2d 356 (5th Cir. 1931). However, where a waterway is either artificially created by construction through fast lands or is non-navigable in its natural condition but rendered navigable through artificial improvements, it obviously is not navigable in its *natural* condition; and ownership thereof is perfect; while it may be subject to some form of federal regulation, private property rights therein cannot be taken without compensation.

Analagous to this discussion of the dichotomy between private waterways and rivers and streams navigable in their natural condition are the private property rights recognized with respect to toll canals. While riparian owners along rivers and streams navigable in their natural condition cannot restrict public access to such waters since they constitute waters of the United States, owners of private canals may restrict public access to the same by requiring payment of tolls for the use thereof.[3] These toll canals obviously are not subject to a navigation servitude, otherwise tolls could not be charged by the owners and operators thereof.[4]

D. The Navigation Servitude and Regulatory Jurisdiction are Separable Concepts Because of the 5th Amendment Limitation on the Commerce Clause

The term navigable waters of the United States has been various definitions depending upon its legal applications.

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[3] *Harvey v. Potter,* 19 La. Ann. 264 (1867), *Perrine v. The Chesapeake & Delaware Canal Co.,* 50 U.S. (9 How.) 172, 13 L.Ed. 92 (1850).

[4] See 36 Op. U.S. Atty. Gen. 203, (1930) where in denying a right to take over privately owned and constructed portions of a toll canal which formed a part of a waterway owned by the State of Illinois it was stated: "... Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, it does not follow that the United States could take possession of it, appropriate it, exclude the owner and deprive the latter of any investment upon it." At p. 214.

For example, regulatory jurisdiction under the RHA[5] extends to waters which are navigable in fact under *The Daniel Ball* standard;[6] to waters which in some areas are non-navigable in their natural and ordinary condition, but which can be made navigable in those areas with reasonable improvements;[7] and arguably to certain artificial waterways which are actually used in interstate commercial activities.[8] Additionally, and perhaps most noteworthy is the scope of ecological regulatory jurisdiction over navigable waters of the United States conferred under the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1311, et seq.). The term

[5] Congress delegated to the Department of the Army, United States Corps of Engineers the duty to protect and preserve the navigable waters of the United States in aid of navigation thereon and thereover. The relevant sections of the RHA are 9 and 10 (33 U.S.C. §401 and 403) which prohibit placement of structures or works in navigable waters without prior authorization evidenced by a permit from the Corps.

[6] See *Egan v. Hart*, 165 U.S. 188, 41 L.Ed. 680 (1897); *Utah v. United States*, 403 U.S. 9, 29 L.Ed.2d 279 (1971); *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex., 1928); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *United States v. Ross*, 74 F.Supp. 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp. 852 (Ct. Cl. 1949); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978).

[7] *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940).

[8] *Dow Chemical Company v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972) cert. denied, 409 U.S. 1040 (1972). In holding the artificial canal subject to RHA regulatory jurisdiction, the Fifth Circuit relied primarily on three cases concerned with the extent of Admiralty jurisdiction. See *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Dagger v. U.S. N. S. Sands*, 287 F.Supp. 939 (D. W. Va. 1968); *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F.Supp. 909 (E.D. La. 1963). These cases are questionable as analogous RHA authorities since RHA jurisdiction is underpinned by the waterway being a public highway of interstate commerce; it is not made so because the owner uses it as access to navigable waters of the United States for carriage of his own goods any more than using a private driveway for access to public highways by motor vehicle traffic can be said to grant public access to the driveway.

navigable waters of the United States has been construed thereunder to include any waterbody, regardless of how shallow and how remote its interstate connexity may be, if activities therein have an impact on the environment, because "Congress clearly meant to extend the Act's jurisdiction to the constitutional limit . . . ". *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 48 L.Ed.2d 578 (1976); *Weismann v. Dist. Eng. U.S. Army Corps of Engineers*, 526 F.2d 1302 (5th Cir. 1976); *State of Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wo. 1977). See also *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978), and cases cited therein.

The 5th Amendment constitutional constraints upon the application of the navigation servitude render it much more limited in scope than the full regulatory power of Congress under the Commerce Clause. *United States v. Kansas City Life Insurance Company*, 339 U.S. 799, 94 L.Ed. 1277 (1950). Unfortunately, this limitation on the application of the doctrine has not always been carefully observed in decisions construing the scope of regulatory jurisdiction under the Commerce Clause over waters of the United States. Lower courts, commencing with the decision of *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), cert. denied 401 U.S. 910 (1971), began speaking of ecological regulatory jurisdiction under the Commerce Clause and the navigation servitude as if the two concepts were synonymous.[9]

[9] See also *United States v. Stoeco Homes Inc.*, 498 F.2d 597 (3rd Cir. 1974), cert. denied 420 U.S. 927 (1974), *United States v. Cannon*, 363 F.Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F.Supp. 1132 (S.D. Ga., 1973). *Zabel v. Tabb*, the Corps of Engineers defined "navigable waters" as waters which were navigable in fact or potentially navigable with reasonable improvements. 33 CFR §209.260 (1971). Reacting to this decision and others subsequent to it, the Corps redefined its regulatory jurisdiction to include non-navigable in fact fringe areas of waters navigable in fact, i.e., to the point of ordinary high water on banks of rivers, and to the point of mean high water on shores of tidal water bodies. See 33 C.F.R. §329, et seq. (1978).

Zabel v. Tabb was a dredge and fill permit case in which the court held regulatory jurisdiction extended to all areas within the reach of the ebb and flow of the tide, even though those areas were not navigable in fact, nor could they become navigable with reasonable improvements, because they were subject to "the paramount servitude in the Federal government," 430 F.2d at p. 215. This decision is apparently the first application of the navigation servitude to regulate private activities for purposes other than to aid navigation.

While the ecological result may be correct and cause no Constitutional trauma per se because private property rights were not taken or destroyed, but only regulated, and the Commerce Clause may afford jurisdiction to the full constitutional limit to protect the environment, the equation of the navigation servitude to regulatory jurisdiction under the broadest Commerce Clause application contravenes the purpose of the servitude, which is *only* to aid navigation. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950). However, once the servitude is said to attach to a waterway, the concomitant is that private property rights can be taken without compensation. Moreover, predicating the attachment solely on ecological regulatory jurisdictional grounds without considering the potential affect on private property rights manifests the Consitutional confrontation between the 5th Amendment and the Commerce Clause caused by indiscriminate application of the servitude doctrine within the realm of regulatory jurisdiction without careful analysis of the purpose for which it is invoked.[10] And it is

[10] The navigation servitude, when it lawfully attaches to a navigable water of the United States, not only affords a right of public access to surface waters, but also permits the taking, use, dredging or flooding of the bed up to the point of ordinary high water on river banks (or mean high tide on the shore in tidal areas), all without compensation to property owners. If, as a result of such taking, improvements are destroyed or rights of access to the waterway are lost, no compensation is required,

that Constitutional confrontation which absolutely precludes a blanket indictment of property rights under the premise that the navigation servitude and regulatory jurisdiction over waters of the United States, however defined and applied, are inseparable. This, of course, is not to suggest that regulatory jurisdiction and the servitude cannot both attach simultaneously to certain water bodies; they can and do, but only where the water body is navigable in its *natural* condition, and where it forms a continuous highway of interstate commerce. Anything short of that will not Constitutionally sustain the servitude even though some other form of regulatory jurisdiction may Constitutionally subsist.

E. Rivers and Harbors Act Jurisdiction Does Not Extend to Privately Owned Waterways Rendered Navigable With Private Funds for Private Purposes

The term "navigable waters of the United States", at the time of the enactment of the RHA, had a well understood meaning developed under Admiralty law and expressed in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870): such waters had to be navigable in fact in their ordinary condition, and, either alone or united with other waterbodies, they had to form a continuous highway over which commerce is or may be carried on between the States. *Utah v. United States*, 403 U.S. 9, 29 L.Ed.2d 279 (1971); *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974); *Minnehaha Cr. Watershed Dist. v. Hoffman*, 449 F.Supp. 876 (D. Minn. 1978). In *Hardy Salt*, the Court made these pertinent

even when the livelihood of the riparian owners may be destroyed. See *United States v. Rio Grande Dam & Ins. Co.*, 174 U.S. 690, 436 L.Ed. 1136 (1899); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 57 L.Ed. 1083 (1913); *United States v. Chicago M., St. P.P. & R Co., 312 U.S. 592, 85 L.Ed. 1064 (1941); United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 94 L.Ed. 1277 (1950); *United States v. Rands*, 389 U.S. 121, 19 L.Ed.2d 329 (1967).

remarks in denying RHA jurisdiction over a landlocked lake because it was not a highway of commerce between the states:

> "The phrase 'navigable water of the United States' has been used by Congress in several statutes prior to the 1899 Act, e.g. Act of July 7, 1838, ch. #91, 5 Stat. 304 . . . The term, as used in the Act of 1838, cited above, was defined in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). The Supreme Court there stated that:
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> '. . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by *themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.*' (Emphasis added [by Court].)
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> * * *
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> "We conclude that a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be construed in line with the interpretation in The Daniel Ball as contemplating such a water body forming a continuous highway over which commerce is or may be carried on with other states or foreign countries by water . . ." 501 F.2d at pp. 1167-1169.

As pointed out previously, *The Daniel Ball* standard of navigability was modified in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L.Ed. 243 (1940), where this honorable Court held that "navigable waters of the United States" included non-navigable waterways which could be made navigable for commercial interstate navigation with reasonable improvements. However, as stated in *Hardy Salt v. Southern Pacific Trans. Co.*, 501 F.2d 1156, 1165-69 (10th Cir. 1974), cert. denied 419 U.S. 1033 (1974), neither the *Appalachian* decision nor any other decision which modified *The Daniel Ball* test of navigability alters the requirement that a waterway must be, or be a part of, a continuous highway of commerce between the states before RHA jurisdiction attaches. As was stated in another recent case, "It is clear that the intent and purpose of the Act (RHA) was to insure free navigability of interstate commerce through federal regulation of the subject waterbodies. Congress did not intend to extend federal regulatory jurisdiction to every spot of navigable water in the country." *Minnehaha Cr. Watershed Dist. V. Hoffman*, 449 F.Supp. at p. 884. See also *Eagan v. Hart*, 165 U.S. 188, 41 L.Ed. 680 (1897); *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917); *Gulf Interstate Ry. Co. of Texas v. Davis*, 26 F.2d 930 (S.D. Tex. 1928); *Pitship Duck Club v. Town of Sequim*, 315 F.Supp. 309 (W.D. Wash. 1970); *United States v. Ross*, 74 F. Supp 6 (D.C. Mo. 1947); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F. Supp. 852 (Ct. Cl. 1949).

Admittedly, Kaiser Aetna's marina is presently navigable; however, it certainly was not navigable in its natural condition, and it is not now, nor has it ever been an

interstate highway of commerce any more than a private parking lot on private property which leads into a public street can be said to be part of a continuous interstate highway, subject to state and federal regulatory jurisdiction. Consequently, both the District Court and the Circuit Court erred in holding that Kaiser Aetna's marina is a navigable water of the United States subject to RHA jurisdiction.

IV.
CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit holding that privately owned waterbodies rendered navigable with private funds for private purposes are subject to the Rivers and Harbors Act jurisdiction and the navigation servitude is erroneous and should be reversed.

Respectfully submitted,

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